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CHARLES ELMORE C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 316

ISIDORE B. BERNSTEIN,

Petitioner,

against

EMS CORPORATION,

Respondent,

and

LEOPOLD OLIAN and MORRIS CANTOR, co-partners doing business under the firm name and style of OLIAN & CANTOR,

Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

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BARENT TEN EYCK, counsel on behalf of ISIDORE B. BERNSTEIN, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered May 24, 1949, (1) reversing the judgment and order of the United States District Court for the Southern District of New York which denied Respondent EMS CORPORATION's, motion under Rule 50(b) of the Federal Rules of Civil Procedure, to set aside the ver-

dict and dismiss the complaint or in the alternative, to set aside the verdict and order a new trial; and (2) ordering the complaint herein dismissed on the ground that there was insufficient evidence to sustain the jury's verdict in favor of petitioner and against respondent.

Opinions Below

The opinion of the District Court (RIFKIND, *J.*) (R. 420-426) is reported at 77 F. Supp. 672. The opinion of the Court of Appeals (Swan, J. with Hand, C. J., and Frank, J.) (R. 434-437) is reported at 174 F. 2d 880.

Jurisdiction

The judgment of the Court of Appeals was entered on May 24, 1949 (R. 438). A timely petition for rehearing was filed on June 8, 1949 and was denied by the Court of Appeals on June 13, 1949 (R. 439-449). The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Questions Presented

Whether, after a District Judge had denied a motion for judgment n.o.v. and entered judgment on the jury's verdict, which was amply supported by evidence of record, a United States Court of Appeals has the power (1) to overturn the jury's verdict and (2) itself to order entry of judgment n.o.v., or whether such power exists only "when there is a complete absence of probative facts to support the conclusion reached". *Lavender* v. *Kurn*, 327 U. S. 645, 653.

Constitution and Statutes Involved

The provisions of the Seventh Amendment of the Constitution of the United States, and of Rule 50(b) of the Federal Rules of Civil Procedure (adopted by this Court pursuant to the Act of June 19, 1934, c. 651 48 Stat. 1064) are set forth in Appendix A, p. 23, *infra*.

Statement

On July 2, 1945, petitioner, a normal and healthy citizen of Los Angeles, aged 45, walked into the store of Olian & Cantor at 257 West 39th Street, New York City, to purchase cloth for use in his sportswear manufacturing business (R. 53, 195). Within less than an hour, petitioner was carried out of the store to Bellevue Hospital, permanently disabled because a heavy hanging lighting fixture and portions of the ceiling to which it was attached by a chain had crashed down upon his head (R. 53-54). There is no question but that petitioner, who had never before been in the store, was wholly blameless, or that the lighting fixture was defectively attached to the ceiling which had been subjected to unusual stresses and strains.

Petitioner brought this personal injury action against both Olian & Cantor, the tenant, and respondent Ems Corporation, the landlord, in part of whose 16 story building the store was located (R. 195, 240). On the evidence presented at a trial before Judge NORDBYE, a jury of 12 representative citizens concluded that both the landlord and tenant were at fault and that petitioner should recover $7,000 from the defendants. Judge NORDBYE not only denied defendants' motions, made at the completion of petitioner's case, to direct a verdict, but ultimately set the verdict aside

as "patently inadequate"[1] and ordered a new trial. On the evidence presented at the second trial, another jury of 12 representative citizens concluded that the tenant was not at fault, that all the fault lay with the landlord and that the landlord should pay $102,500 to petitioner to indemnify him for his medical expenses and permanent disability.[2] The District Judge (RIFKIND, *J.*) agreed with the jury and sustained its verdict over the landlord's motion for judgment notwithstanding the verdict.

Yet the Court of Appeals for the Second Circuit, which neither saw nor heard the evidence, determined, on respondent's appeal from Judge RIFKIND's order, that the record was insufficient to support the conclusion reached by two juries and sustained by two trial judges as to the landlord's fault. The Court of Appeals, on its *own* view of the evidence, concluded not merely that petitioner had not produced sufficient evidence to prove his case, but that he never could do so, and, therefore, it ordered the complaint dismissed.

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[1] The opinion of Judge NORDBYE, which is not reported, is printed as Appendix B, pp. 24-27, *infra*.

[2] The jury's verdict for $102,500 was cut down to $100,000 because the complaint (which petitioner unsuccessfully sought to have amended to claim damages of $150,000) claimed only $100,000. By the date of the second trial herein, petitioner had suffered almost three years of excruciating pain, involving 4 hospitalizations, a serious operation for the removal of a portion of his spine, the wearing of a brace for a year and subjection to tormenting corrective exercises of various kinds of long periods of time (R. 13-32, 54-80). The medical testimony indicated that the fall of the fixture and parts of the ceiling was the cause of the injury (R. 14-20, 25-31) which technically is described as a herniated disc between the 6th and 7th cervical vertebrae and "a very compressed 7th nerve root" (R. 13, 18-19, 25, 33-35). At the time of the second trial, petitioner was still under treatment (R. 78) and suffering pain (R. 77) and his physical condition was such as to prevent normal attention to business (R. 78-79). In addition to medical expenses amounting to $3,000, petitioner has suffered loss of income for 3 years, of between $10,000 and $12,000 annually. And, on the testimony of his doctors, (R. 31-32, 169) since he will never be able to resume the type of work he was used to doing, his earning power in the future will be substantially reduced.

Perhaps the most compelling evidence of the gravity of petitioner's injuries may be found in the fact that Judge NORDBYE set aside, as inadequate, a verdict of $7,000 and Judge RIFKIND stated (R. 426):

> "The only other point which requires mention is the defendant's contention that the amount of the verdict is excessive. The nature of the injury was such that this objection is, in my judgment, without any merit whatever."

As a result, the concededly innocent petitioner must suffier his permanent disability and foot the extensive medical bills without any indemnification from either the tenant or the landlord in whose premises the fixture was defectively attached.

There is no dispute, as both petitioner's expert and the tenant's expert agreed,[1] that the lighting fixture which struck the petitioner, was defectively fastened to the ceiling beam in the store (R. 124-125; 134-135; 259). The fixture and lighting equipment which produced the injury consisted of: a base plate and a unit box, which were the parts immediately attached to the ceiling beam, a decorative canopy covering them, a supporting chain, a bulb and a globe (R. 110-111,, 118-119, 128-129). Two significant defects vitiated the attachment of the fixture to the ceiling.

First, although the base plate had four openings for the insertion of screws (R. 128-129) and proper practice called for the use of four screws (R. 259), the fixture in question was attached to the ceiling by only two screws (R. 119-120, 248-249).

Second, each of the screws was only 1 and $\frac{1}{8}$th of an inch long (R. 120), and was, therefore, not able to penetrate through the outer plaster and into the concrete with which the ceiling beam was covered,[2] with sufficient "purchase" for proper and safe suspension of the fixture (R. 124-125, 134-135, 259).

While the covering canopy concealed these defects from one merely looking up at the ceiling (R. 262), both defects would have been obvious to anyone removing the canopy, or to those who originally installed the fixture. The fact that there were only two, instead of the requisite four,

[1] The landlord, respondent EMS Corporation, called no expert of its own.

[2] There was a two inch covering of concrete around the steel beam from which this lighting fixture was suspended (R. 128, 240-241, 248), and covering the concrete there was a layer of plaster from ¼ to ¾ of an inch thick (R. 248).

screws, would appear merely from looking at the uncovered base plate. And, as the tenant's expert conceded, the fact that the screws were too short would result, immediately upon their insertion, in pulverizing the plaster surrounding the base plate (R. 260-262);[1] and this would be visible to anybody looking at the plaster.

The record also shows that up to the time of the accident there was continuous jarring of the entire ceiling, caused by cases of rayon being thrown about by the tenant upstairs (R. 224-226). The tenant's expert testified that "excessive vibration due to cases being thrown on the floor above", if kept up and mounting "over a period of time", would cause cracking of the ceiling plaster and thus loosen the already inadequately fastened fixture (R. 262-263). As a result, it required no more than Mr. Olian's pulling the drop chain in attempting to turn on the light, as he did on July 2, 1945, when petitioner entered his store, to bring down the fixture and portions of the ceiling on petitioner's head (R. 53-54).

While there was no question that petitioner was injured as a result of the fact that the fixture was improperly and unsafely attached and that there were continuous stresses on the ceiling, there was considerable dispute as to who was liable therefor.

The tenant and the landlord each denied sufficient control over the ceiling beam and the lighting fixture to predicate the imposition upon it of any duty of care.[2]

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[1] Fixtures such as are here involved, are properly installed by drilling holes through the ceiling plaster into the concrete, inserting "rawl plugs" (made of treated jute fibre, such as were here used) (R. 129, 239, 249-250) or "keystone plugs" (made of metal) (R. 123) and then putting in screws of a type appropriate to the plugs selected (R. 121-123, 129-130). The function of the screws is to expand the plugs, causing tension against the holes in the concrete, and thus firmly supporting the fixtures (R. 129). When such screws are too short, the result is to expand the plugs against the *plaster*, rather than against the concrete, and to cause the plaster to crumble and pulverize, thus leaving the fixture improperly and unsafely suspended (R. 260-262).

[2] Olian and Cantor's lease from Ems (Plaintiff's Exhibit 11; photostatic copies of which are submitted with the record on appeal) among other things:

Apart from the question of control, the landlord made a considerable issue of its lack of knowledge or reasonable cause to know of the dangerous condition of the ceiling. On this question, the record shows that Olian and Cantor had complained of the jarring and vibration of the ceiling caused by the movement of heavy cases of rayon by the neighboring tenant above Olian & Cantor's store and that this condition had, by the time of the trial, been remedied (R. 234). These complaints had been made some time early in 1942 to the superintendent of the building (R. 233-234). He maintained a large staff of employees to supervise the safety and maintenance of the building (R. 300); and he visited the premises on a number of occasions for maintenance purposes (R. 297) but never removed the canopy covering the base plate here involved (R. 301), although

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(a) Gave Ems the right to enter the demised premises at all times to make such repairs, alterations and improvements as it deemed necessary or desirable (par. 16).

(b) Provided that Ems' entry for such purpose should not constitute an eviction or abate any part of the rent (par. 5).

(c) Prohibited Olian and Cantor, as tenants, from marking, painting, drilling into or in any way marring or defacing any part of the demised premises (par. 4).

(d) Prohibited Olian and Cantor from boring, cutting or stringing wires (par. 4).

(e) Charged Olian and Cantor, as tenants, with the expense of such repairs, only, as should be necessitated by their own carelessness or negligence, or by that of their servants, visitors and licensees (par. 5).

(f) Provided that Ems should not be liable for injuries to persons or property resulting from falling plaster, unless caused by Ems' negligence (par. 10).

(g) Obligated Olian and Cantor to permit Ems to erect, use and maintain the pipes and conduits in and through the demised premises (par. 16).

(h) Permitted Ems to enter the demised premises for the above purposes by force, if necessary, without being liable therefor (par. 16).

When Olian and Cantor first moved into their store, under a lease from Ems' predecessor in title, all the electric lighting fixtures and appurtenant chains were already present, suspended from a ceiling beam; but there were no globes or bulbs (R. 196-197, 208-210, 298). Olian and Cantor had these, and a decorative canopy, installed (R. 196, 210). However, they had nothing at all to do with the installation of the supporting fixtures themselves (R. 196). Those remained unaltered and untouched, as originally installed, up to the time of the accident to the petitioner (R. 197-198).

It was admitted by Ems that after the accident employees of Ems removed the debris and that the ceiling was repaired at Ems' expense and at Ems' initiation (R. 285, 185, 186).

its removal entailed only a simple 15 second operation that required no special skill (R. 264). Respondent, Ems Corporation, which purchased the building from the previous owner in November, 1942 (R. 209, 236), retained the services of the same building superintendent who had served its predecessor (R. 278-279), and to whom Olian & Cantor's complaints had been addressed.

In sum, as the District Court pointed out (R. 420-421):

> "The jury could find as to the Ems Corporation (hereinafter Ems): (1) Ems was the owner of the building and the lessor of the store premises where the accident causing the injuries suffered by the plaintiff occurred; (2) Ems had reserved the right to enter the premises to make repairs; (3) Ems was obliged to make repairs at its own cost if the damage or condition was not caused by the negligence of the tenant; (4) Ems prohibited the tenant from painting, drilling into or in any way marring or defacing any part of the demised premises; (5) the repair of the dangerous condition which caused the electric fixture and part of the ceiling to fall and strike the plaintiff called for both drilling and painting; (6) Ems employed a large staff of maintenance employees in connection with the operation of the multi-story building of which the store premises were a portion; (7) Ems' building superintendent frequently visited the store premises in connection with his duties; (8) for some time prior to the fall of the electric fixture, the tenant on the floor above the store premises trundled heavy parcels in such a manner as to cause violent vibration of the ceiling of the store premises; (9) a considerable time before the accident, notice of these vibrations was given to the landlord's agents by the tenants, Olian and Cantor; (10) immediately after the accident Ems' employees took away the debris; (11) shortly thereafter Ems caused the repairs to be made at its own expense and on its own initiative; (12) Ems had control of the site of the danger; (13) reasonable care required inspection of the ceiling and its lighting fixture, at least after notice of the stresses to which the ceiling was subjected; (14) such inspection was simple and

could readily be performed; (15) inspection would have revealed the danger; (16) Ems was negligent in that by the exercise of reasonable care it could have discovered the condition, realized that it involved an unreasonable risk to business visitors and made the condition safe. (Restatement of Torts, § 343; Restatement of Torts, § 361)."

On the basis of the foregoing evidence, the jury concluded that respondent Ems Corporation was negligent, and defendants Olian and Cantor were not negligent. In view of the grave injuries which have rendered petitioner permanently disabled and caused him substantial medical expenses, the jury rendered a verdict of $102,500.00.[1]

Subsequent to the jury's verdict, respondent Ems Corporation moved under Rule 50 (b), for a new trial, or in the alternative, for judgment notwithstanding the verdict, and petitioner moved to set aside the verdict in favor of Olian & Cantor. In a careful and thorough opinion, the District Judge denied the motion of respondent. Subsequently he denied the motion of petitioner. The District Court entered judgment in favor of petitioner on the jury's verdict.

The Court of Appeals for the Second Circuit reversed the order of the District Judge, and directed the dismissal of the complaint, solely on the ground that the evidence in the record was insufficient to sustain the jury's verdict that respondent, Ems Corporation, knew or had reasonable cause to know of the dangerous nature of the ceiling.

Specification of Errors to be Urged

The Court below erred:

(1) In failing to affirm the order of the District Court denying respondent Ems Corporation's motion for a new

[1] See *supra*, p. 4, n. 2.

trial, or in the alternative for judgment notwithstanding the verdict, and in failing to affirm the judgment of the District Court.

(2) In reversing the order of the District Court denying respondent Ems Corporation's motion for a new trial or in the alternative for judgment notwithstanding the verdict, and in directing the dismissal of the complaint.

Reasons for Granting the Writ

Rule 38 (5) (b) of the Rules of this Court lists five considerations, any one of which might impel this Court to grant certiorari. Over and above the shocking result of the decision in this case, which of itself suggests that the Court of Appeals "has so far departed from the usual and expected course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision", we submit that not one, but four, of the five considerations adverted to in Rule 38 (5) (b) are here present.

In *Montgomery Ward & Co.* v. *Duncan,* 311 U. S. 243, this Court suggested that a United States Court of Appeals has the power not merely to reverse a District Court's order denying a motion for a new trial, but also to reverse a District Court's order denying a motion for judgment notwithstanding the verdict, and *"itself [to] enter judgment n.o.v."* (254) (emphasis supplied). In *Cone* v. *West Virginia Pulp & Paper Co.,* 330 U. S. 212, this Court decided that a Court of Appeals, if convinced that the jury's verdict is wholly without support in the evidence, should not itself direct entry of judgment n.o.v., but should remand the case to the District Court for that Court to exercise its "primary discretionary responsibility" as to whether to dismiss or to order a new trial. See also *Globe Liquor Co.* v. *San Roman,* 332 U. S. 571; and compare *Fairmount Glass Works* v. *Cub Fork Coal Co.,* 287 U. S. 474, 481-482.

If the suggestion in the *Montgomery Ward* case may constitutionally,[1] and under the Federal Rules, prevail over the rulings in the *Cone* and *Globe Liquor* cases, the conclusive nature of the power to overturn a jury's verdict for lack of support in the evidence, which is thus reposed in a court far removed from the live testimony and the atmosphere of the trial, underscores the importance of the rigorous limitations this Court has prescribed upon the lawful exercise of such power.

The question presented in this case is whether the governing norm invoked by the Court of Appeals to determine when it may conclusively reverse a jury's verdict, and deny to the district judge an opportunity to exercise his "primary discretionary responsibility", conforms to the rigid restrictions with which this Court has circumscribed the exercise of such power. We submit that it does not, and the magnitude and importance of the Court of Appeals' misconception of its power in this matter are sufficiently far reaching to call for the exercise of this Court's corrective authority.

First: The decisions here prohibit a court—whether appellate or trial—from "reweighing" the evidence upon which the jury reached its verdict, or itself assessing the validity of the jury's inferences from the evidence. They teach that "only when there is a complete absence of probative facts to support the conclusion reached" by the jury (*Lavender* v. *Kurn*, 327 U. S. 645, 653) or when the jury's verdict is "without support in the evidence" (*Tennant* v. *Peoria & Pekin Union Ry. Co.*, 321 U. S. 29, 35) may a court exercise its power to overturn a jury verdict and dismiss the complaint. The narrow scope thus accorded for exercise of the power conclusively to terminate the case by rejecting a jury's verdict is accentuated by the less confining

[1] Compare *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, and *Aetna Ins. Co.* v. *Kennedy*, 301 U. S. 389 with *Baltimore & C. Line* v. *Redman*, 295 U. S. 654.

limitations upon the exercise of the power to order a new trial,—and thus to offer plaintiff an opportunity to correct a deficiency of proof—[1] which may be invoked when the Court finds that the jury's verdict is "against the weight of the evidence". *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250-251. Compare *Simmonds* v. *Capital Transit Co.*, 147 F. 2d 570 (App. D. C.).

Against the background of such restrictions upon a Court's power to overturn a jury's verdict, this Court only recently elaborated upon the peculiarly limited competence of a Court of Appeals to order entry of judgment n.o.v., when it insisted that the District Judge, rather than the Court of Appeals, should determine, at least in the first instance, whether the state of the evidence called for a new trial rather than for judgment n.o.v. Because it is the trial judge, and not the appellate court, "who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart", his is the "primary discretionary responsibility" to determine whether to foreclose the litigant completely or to authorize a new trial. *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 216; *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571. Precisely the considerations upon which the decision in the *Cone* case rests (compare *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 481-482) underlie the "rigor of the rule" (*Simmonds* v. *Capital Transit Co., supra*) which permits an appellate court to reverse the Trial Court, and itself to direct the entry of judgment n.o.v. only when "there is a complete absence of probative facts to support the conclusion reached" by the jury.

That the Court of Appeals for the Second Circuit conceives its power conclusively to overturn a jury verdict as reaching considerably beyond the narrow area to which this

[1] See e.g. *Shoenfelt* v. *Pennsylvania R. Co.*, 69 F. Supp. 728 (S. D. N. Y.).

Court has thus confined it is apparent from the disposition of this case, as well as from its rulings in other cases.

The Court of Appeals did not dispute that the instant case had been submitted to the jury on instructions which accurately embodied the New York law as to the requisite care and knowledge with which the Landlord was charged in the premises. On the contrary, its opinion effectively adopted, as the substantive law, the District Court's charge to the jury that the landlord was liable if it "knew, or by the exercise of reasonable care, could discover the dangerous condition of the ceiling" (R. 409).[1] Not only does this statement of the standard governing respondent's liability conform to the New York decisions,[2] but it was in no way challenged by respondent, whose vigilant counsel excepted vigorously to the other portions of the charge dealing with the question of respondent's "control" of the premises and the issue of damages (R. 413-414).

The jury's verdict must, therefore, be taken to embody the conclusion that, at least to the jury, the evidence demonstrated that respondent, Ems Corporation, either knew of, or by the exercise of reasonable care should have discovered, the precarious condition of the ceiling and fixture. That there was solid evidence to support this conclusion is apparent from the facts that (1) the fixture was defectively attached to the ceiling (R. 124-125, 134-135,

[1] The Court of Appeals' acceptance of the District Court's charge on this question contrasts significantly with its doubts as to the conformity of the result below to the law of New York on the question whether the lease gave the respondent sufficient control of the premises to render it liable for the injury. The Court of Appeals expressly avoided passing upon that question and disposed of the case wholly upon its conclusion that the evidence was insufficient to sustain the verdict that the landlord knew or had reasonable cause to know of the dangerous condition of the ceiling.

[2] See e.g. *Lusk* v. *Peck*, 132 App. Div. 426, 430-431, 116 N. Y. Supp. 1051 (4th Dept.), affirmed 199 N. Y. 546; *Rosenberg* v. *Rosenberg*, 247 App. Div. 765, 766, 285 N. Y. Supp. 859 (2nd Dept.); *Goodstein* v. *Milmo Realty Corp.*, 8 N. Y. Supp. 2nd 243; *Constant* v. *University of Rochester*, 111 N. Y. 604; *McCutcheon* v. *Dittman*, 164 N. Y. 355; compare *Dittiger* v. *Isal Realty Corp.*, 290 N. Y. 492, 495-496, and *Schroeder* v. *City and County Savings Bank of Albany*, 293 N. Y. 370, 374 on the question of *res ipsa loquitur*.

259); (2) jarring and vibration caused by the moving by crates by the tenants above Olian and Cantor caused stresses upon the ceiling (R. 224-226, 262-263); (3) the defective attachment of the fixture to the ceiling could have been readily seen by the removal of the canopy surrounding the base plate (R. 260-262); (4) the canopy could have been removed in the course of a simple fifteen second inspection (R. 264); (5) respondent Ems Corporation maintained a large staff to care for the safety and maintenance of the building (R. 300); and (6) Olian & Cantor had given notice of the stresses and vibrations affecting the ceiling to the respondent Ems Corporation's agent (R. 233-234),[1] who on a number of occasions visited the premises in the course of performing his duties (R. 297), but never saw fit to inspect the attachment of the fixture to the ceiling (R. 301).

We do not contend that the only conclusion which the jury could have reached under the circumstances was that the landlord knew of the dangerous condition of the ceiling, or even that he should have discovered it by the exercise of reasonable care. That such conclusions could validly be reached by the jury, however, cannot be doubted. And certainly, a record containing the evidence here produced does not disclose "a complete absence of probative facts to support" such a conclusion, or render the jury's verdict "without support in the evidence".

In the face of this record, there can be little question that the Court of Appeals did not simply misread the evidence in this particular case; rather, it attempted to test the propriety of the jury's verdict by itself sifting and weighing the validity of the jury's inferences on the erroneous assumption of an authority to reappraise verdicts that, in fact, is denied to it by the decisions of this Court. Other decisions of the Court of Appeals con-

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[1] Compare *Goodstein* v. *Milmo Realty Corp.*, 8 N. Y. Supp. 2nd 243; *Constant* v. *University of Rochester*, 111 N. Y. 604; *McCutcheon* v. *Dittman*, 164 N. Y. 355.

firm this conclusion. This is not the first case in which that Court's apparent reluctance to accept whole-heartedly the substantive norms of "negligence" embodied in local or federal law has led it to intrude itself into the area of factual determination constitutionally reserved for the jury, and unlawfully to direct the dismissal of a complaint which the evidence was adequate to prove. Twice, in such cases during the past eight years, this Court has reversed the Court of Appeals for usurping the jury's function and has reinstated the jury's verdict. *Conway* v. *O'Brien*, 111 F. 2d 611, reversed 312 U. S. 492, *Jacob* v. *New York City*, 119 F. 2d 800, reversed 315 U. S. 752.[1] And a third time, in a context other than "negligence", (*Berry* v. *United States*, 111 F. 2d 615, reversed 312 U. S. 450) this Court reversed a ruling of the Court of Appeals dismissing a complaint after a jury verdict had been rendered in favor of the plaintiff.

The opinions of the Court of Appeals since those reversals disclose a continued assertion by that Court of power to dismiss complaints in the teeth of jury verdicts that is denied to it by those, and other, decisions of this Court. Thus in *Fratta* v. *Grace Line, Inc.*, 139 F. 2d 743, 744[2] the Court of Appeals explicitly defined its power to dismiss a complaint as dependant upon whether the verdict in favor of the complainant was "against the weight of the evidence". However valid such a test may be for determining whether to grant a new trial, (cf. *Montgomery Ward & Co.* v. *Duncan, supra*) there can be no doubt that it permits the exercise of a discretion to dismiss a complaint which the decisions of this Court negate. While the Court of Appeals appears to have receded somewhat from the extreme view it expressed in the *Fratta* case (cf. *Binder* v. *Commercial Travelers Mut.*

[1] See also *Brennan* v. *Baltimore & O. R. Co.*, 115 F. 2d 555 (relied upon by the Court of Appeals for the Seventh Circuit in *Cogswell* v. *Chicago & E. I. R. Co.*, 153 F. 2d 94, 97, *rev'd*, 328 U. S. 820); *Williams* v. *New Jersey-New York Transit Co.*, 113 F. 2d 649.

[2] See also *Willis* v. *Pennsylvania R. Co.*, 122 F. 2d 248.

Acc. Ass'n, 165 F. 2d 896), the instant decision and others[1] make plain that it has not receded so far as to forego the power which this Court has denied to it, to itself dismiss the complaint on the basis of its own weighing of the evidence and the validity of the jury's inferences therefrom.

Second: Apart from its assertion of a forbidden power to interfere with jury verdicts, the Court of Appeals has in the instant case, and in the *Binder* case, evolved a procedure under Rule 50 (b) which conflicts with the decisions of this Court in the *Cone* and *Globe Liquor* cases. In the *Binder* case, the Court of Appeals, on reversing the Trial Judge, did not reinstate the verdict, but rather deferred to his "primary discretionary responsibility" as to whether to order a new trial. In the instant case, on reversing the Trial Judge, it ruled conclusively on the motion for judgment n.o.v. and thus denied to the Trial Judge any opportunity to exercise that "primary discretionary responsibility".

As a result, in the Second Circuit, when the Court of Appeals concludes that the evidence is sufficient to sustain a jury's verdict, it will not reinstate the jury's verdict, but will defer to the Trial Judge's exercise of his "primary discretionary responsibility" as to whether to grant a new trial. On the other hand, when it concludes that the evidence is not sufficient to sustain the jury's verdict, it will not defer to the Trial Judge's "primary discretionary responsibility", but will itself terminate the litigation by dismissing the complaint. The litigant who persuades the jury thus finds himself in a curious position: If the appellate court sustains the jury's verdict, but the Trial Judge does not, the verdict cannot prevail—a new trial will be ordered. If the Appellate Court does not sustain the jury's verdict, even though the Trial Judge does, the complaint will be dismissed—a new trial will not be ordered, even

[1] See e.g. *Cannella* v. *Lykes Bros. S.S. Co.*, 174 F. 2d 794, 795.

though the Trial Judge might deem it appropriate. The only time when a litigant who has obtained a jury verdict can prevail is when both the Trial Court and the Appellate Court agree that the verdict is sustainable. In short, in the Second Circuit, the Trial Judge's "primary discretionary responsibility" operates to prevent a litigant from benefiting from a jury verdict in his favor; but it does not operate to preserve for a litigant an opportunity for a new trial.

It may be that a system so weighted against the jury verdict comports with this Court's suggestion in *Montgomery Ward Co.* v. *Duncan, supra;* but it is plainly not consistent with this Court's decisions in the *Cone* and *Globe Liquor* cases. And, in any event, if the procedural opportunities for judicial frustration of jury's verdicts are so ample, it becomes all the more important to require careful adherence to the rigorous limitations this Court has prescribed on the exercise of a Court's power to interfere with a jury verdict.

Third: That the Court of Appeals' assertion of an improperly broad power to direct the entry of judgment n.o.v. conflicts with the more limited power to which Courts of Appeals in other circuits have been confined by the mandate of this Court, emphasizes the need for invoking this Court's corrective influence. Compare *e. g. Mattson* v. *Central Electric & Gas Co.,* 174 F. 2d 215 (C. A. 8); *Terminal R. Ass'n of St. Louis* v. *Schorb,* 151 F. 2d 361 (C. A. 8). And that need is doubly underscored in this case because the Court of Appeals' misconception has produced a plain conflict with the New York decisions, both as to the substantive law of negligence and as to the sufficiency of the evidence to support the jury's verdict (cf. *Lusk* v. *Peck, supra; Rosenberg* v. *Rosenberg, supra; Goodstein* v. *Milmo Realty Corp., supra; Dittiger* v. *Isal Realty Corp., supra;* and compare *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464).

Fourth: To be sure, in this case the judicial intrusion into the area constitutionally, and by rule, reserved for the jury, does not frustrate a specific substantive policy enacted by Congress. Compare *e. g. Wilkerson* v. *McCarthy*, 336 U. S. 53. Here, the judicial intrusion into the area of factual determination reserved for the jury occurs in the context of Federal judicial frustration of substantive local law. But, tested by the volume of cases in which the problem of judicial interference with jury verdicts may arise in the Federal Courts, the importance of the present context far outweighs that of the F. E. L. A. context.[1] And this case calls compellingly for review of that problem by this Court, both because the facts of record herein raise the question sharply and unequivocally, and because the Second Circuit is, by far, the most important Federal forum for the disposition of personal injury actions.

The facts of this case graphically demonstrate the need for corrective action by this court and the propriety of

[1] The Annual Reports of the Director of the Administrative Office of the United States Courts for the past five fiscal years disclose that of all the non-government civil actions commenced in 84 United States district courts, almost 50% (and in the last year, more than 50%) of the cases initiated on diversity grounds involve the issue of negligence.

The figures, obtained from Tables C.2, C.3 of the Annual Report for 1948, Tables C.2, C.3 of the Annual Report for 1947, Tables C.2 C.3 of the Annual Report for 1946, Tables C.2, C.3 of the Annual Report for 1945, and Tables 6 and 7 of the Annual Report for 1944, follow:

	Private Cases				*Personal Injury*		
	Federal Question	*Diversity*	*F.E.L.A.*	*Jones Act*	*Motor Vehicle*	*Other Negligence*	*Personal Property Negligence*
1948	6,906	10,779	1,038	1,574	2,914	2,207	147
1947	9,298	8,586	799	1,607	2,114	2,060	107
1946	5,085	6,242	661	451	1,368	1,504	65
1945	3,563	5,268	412	384	1,040	1,311	56
1944	3,473	5,233	321	438	1,034	1,220	38
Total	28,325	36,108	3,231	4,454	8,470	8,302	413

It will be noted that diversity cases presenting the issue of negligence arose more than 5 times as frequently as did F.E.L.A. cases and more than 2 times as frequently as did the cases arising under both the Jones Act and the F.E.L.A.

selecting this case as the vehicle for such action. Petitioner, a normal and healthy man of 45, through no fault of his own, and undisputedly because of a defect in the premises, has been permanently disabled and subjected to protracted and painful medical treatment over a period of several years. The decision of the Court of Appeals denies him any recovery at all, and leaves him to suffer without relief while both the landlord and the tenant are left free of all responsibility to an innocent victim of defects in their premises. That decision is in direct contradiction of the opinion of two District Judges and the verdict of two juries, and in flat conflict with the decisions of the New York courts. There is no dispute as to the relevant facts, and the Court of Appeals accepted the District Judge's statement of the governing substantive law. The sole question presented therefore, is as to the scope of the Court of Appeals' power to reject the jury's inferences from the facts.

Not only does this case thus present squarely an important question of judicial power which the Court of Appeals has answered both erroneously (under the decisions here), and in conflict with the decisions of other circuits and of the New York Courts. It brings that question here from the circuit in which its correct resolution has a more pervading importance than it would have in any other circuit. Personal injury actions, revolving around the issue of "negligence" arise far more frequently in the Second

Circuit than in any other circuit.[1] The need for correction of the improper relationship of court to jury now prevailing in the Second Circuit is therefore more compelling than would be a similar need in any other circuit. Whatever considerations might induce this Court to withhold its discretionary authority to grant certiorari, had the same question been presented in another circuit, are not here present. On the contrary, the existence of so large a volume—both relatively and absolutely—of personal injury actions that are governed by the norms established by the Court of Appeals for the Second Circuit, affirmatively calls for this court to exercise its corrective authority over the conduct of that Court, by granting certiorari in this case.

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[1] The Annual Reports of the Director of the Administrative Office of the United States Courts disclose that for the past five fiscal years 20% of the diversity cases presenting the issue of negligence in non-motor vehicle cases, 9% in motor vehicle cases, and 53% of the Jones Act and FELA cases presenting that issue have arisen in the Second Circuit. The Fifth Circuit, which is the only other circuit whose business approaches so large a percentage of the Federal Courts' negligence litigation, has 17% of the diversity non-motor vehicle negligence litigation, 19% of the diversity motor vehicle litigation, and only 2% of the FELA and Jones Act negligence litigation. It is not without significance that the Fifth Circuit is aligned with the Second Circuit in asserting an authority to overturn jury verdicts which the decisions here do not permit. See e.g. *Rhodes* v. *Metropolitan Life Ins. Co.*, 172 F. 2nd 183; *Atlantic Coastline R. Co.* v. *Mitchell*, 157 F. 2d 880; *Dowell* v. *Jowers*, 166 F. 2d 214. The figures follow:

	SECOND CIRCUIT				FIFTH CIRCUIT			
			Personal Injury				*Personal Injury*	
	F.E.L.A.	*Jones Act*	*Motor Vehicle*	*Other*	*F.E.L.A.*	*Jones Act*	*Motor Vehicle*	*Other*
1948	289	1,106	199	447	29	15	560	382
1947	214	1,135	160	362	20	11	406	372
1946	179	280	125	247	26	12	270	270
1945	114	276	128	297	2	3	193	213
1944	134	311	133	290	7	9	169	207
Total	930	3,108	745	1,643	84	50	1,598	1,444
Total in all Federal District Courts during 1944-1948	3,231	4,454	8,470	8,302	3,231	4,454	8,470	8,302
Percentage of total in Second and Fifth Circuits	29%	69%	9%	20%	3%	1%	19%	17%

CONCLUSION

Petitioner respectfully submits that this petition for a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

BARENT TEN EYCK,
Counsel for Petitioner.

HATCH, WOLF & NASH,
VICTOR BRUDNEY,
BENJAMIN H. SIFF,
Of Counsel.

[APPENDICES FOLLOW]

APPENDIX A

The Seventh Amendment to Constitution of United States provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Rule 50 (b) of The Federal Rules of Civil Procedure provides:

Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, this court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

APPENDIX B

Opinion by Nordbye, U. S. D. J.

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

CIVIL 34-647

ISADORE B. BERNSTEIN,

Plaintiff,

vs.

LEOPOLD OLIAN and MORRIS CANTOR, co-partners doing business under the firm name and style of OLIAN & CANTOR and EMS CORP.,

Defendants.

ORDER SETTING ASIDE AND VACATING VERDICT OF THE JURY AND GRANTING PLAINTIFF A NEW TRIAL

The above-entitled cause was tried before the Court and jury, and a verdict of $7,000 was returned in favor of the plaintiff on June 27, 1947. Immediately upon the return of the verdict, plaintiff orally moved to set aside the verdict for inadequacy and that a new trial be granted. The motion was taken under advisement by the Court and the parties were requested to file briefs. The briefs have now been filed and duly considered.

Messrs. Hatch, Wolfe & Nash (Mr. Harry A. Gair, of counsel) all of New York City, appeared for the plaintiff in support of the motion;

and

Mr. Leo F. Potts (Mr. Charles H. Lane, of counsel) both of New York City, appeared for defendant Ems Corporation; and Mr. Frederick Mellor (Mr. Joseph F. Lenihan, of counsel), both of New York City, appeared for defendants Leopold Olian and Morris Cantor in opposition thereto.

It is well-recognized, of course, that the extent of the injuries and the resulting damages therefrom are fact questions for the jury. But where the testimony as to such issues is not disputed, it cannot be arbitrarily and capriciously disregarded by the jury. It must be remembered that the medical testimony in this case was wholly uncontradicted. The plaintiff was examined before trial by defendants' medical experts, but they were not called as witnesses. It is fair to assume, therefore, that their testimony was not substantially different from the opinion expressed by plaintiff's expert, which was to the effect that the accident in question was the direct cause of an injury to, and rupture of, the covering of the intervertebral disc between the sixth and seventh cervical vertebra, necessitating removal of the disc, and that the removal had injured the nerves in the spine. The hospital records of the Bellevue and Jewish Memorial Hospital may not confirm the injury to the disc, but neither do they negative such an injury. The jury must have found that plaintiff sustained something more than a superficial scalp wound when they assessed his damages in the sum of $7,000. The testimony was uncontradicted that plaintiff, a man 47 years of age, had not been able to follow any employment since the accident in July, 1945, and that he would be disabled from following any line of work in the future which would require a continuous eight-hour attention to his duties. Under the evidence, there can be no doubt that plaintiff's intervertebral disc was removed, and in view of the wholly undisputed testimony of Dr. Kolodny, it must follow that its

removal was necessitated by reason of the blow received at the time of the accident. In light of this undisputed testimony, which is not inherently improbable or subject to other inferences, it must follow that the jury should not be permitted to indulge in any conjecture of their own which is without support in the evidence, or to refuse arbitrarily to credit this testimony. An injury such as plaintiff sustained to the covering of the intervertebral disc, necessitating the removal of the disc, and the resulting injury to the nerves of the spine, pertain to the highly technical field of neurology and neurosurgery. Obviously, therefore, a jury, in absence of other evidence or inherent improbabilities in the medical testimony, should not be permitted to nullify such uncontradicted testimony by indulging in speculative excursions of their own into this specialized branch of medical science. There was nothing doubtful, suspicious, or improbable in Dr. Kolodny's testimony, nor in plaintiff's recital of the events which occurred after he arrived home in Los Angeles. Apparently the jury accepted a part of this testimony in determining the amount of damages, but arbitrarily refused to consider the entire testimony in appraising the different elements of damage for which plaintiff should recover compensation, if he was entitled to recover. Or it may be that there was some difference of opinion among the jurors as to the liability of one or both of the defendants and the verdict returned represents a compromise. The question of liability may well have caused some pronounced differences of opinion in view of the evidence and the applicable law. But whatever may have motivated the jury to do that which they did do, in light of the verdict which was returned, I am convinced that if plaintiff is entitled to recover, the amount of damages returned by the jury is grossly inadequate. I cannot in good conscience permit a verdict to stand which stultifies the ends of justice. Under the evidence, plaintiff should have had no recovery at all, or a recovery substantially in excess of $7,000. A mere recital and consideration of the

evidence reflecting the pain and suffering, the loss of earnings (which in itself would exceed the amount of the verdict), the permanent injuries, medical expense, and the prognosis for the future, strikingly demonstrate that the verdict is patently inadequate.

After due consideration, therefore, and being fully advised in the matter,

IT IS ORDERED: That the verdict of the jury in the above-entitled cause be vacated and set aside, and that the plaintiff be granted a new trial herein.

An exception is reserved to each of the defendants.

Dated this 1st day of August, 1947.

BY THE COURT:

GUNNAR H. NORDBYE
United States District Judge,
Acting by Assignment.